

UTAH SCHOOL LAW UPDATE

STOP THE PRESSES!

The case law on student expression runs the gamut from a student's choice of t-shirt to school-sponsored newspapers. In all of the cases, one common denominator remains—student rights of free speech depend on the circumstances under which the student speaks.

For school newspapers, several factors determine whether a school can censor any particular article, ad, editorial, photo, or even the name of the publication.

First, schools have more leeway to curtail student speech in a school-

sponsored publication than in a private, student "underground" publication.

Within the schoolsponsored papers, the level of possible interference with student speech also depends on just how "schoolsponsored" the publication is.

If the newspaper is produced as part of a course, the school has greater control over the content as part of its pedagogical mission.

This was the case in the last U.S. Supreme Court ruling on the topic. In Hazelwood v. Kuhlmeier, the principal of the school pulled several pages from the student newspaper before publication. The principal felt two articles were inappropriate and was under the impression that the newspaper would not be printed in time if he asked

the authors to correct the problems with the articles.

The students sued the school for violation of their First Amendment rights. The school's decision to censor the paper was upheld at trial, overturned on appeal and again upheld by the U.S. Supreme Court.

A divided Supreme Court determined that the principal had valid pedagogical reasons for censoring the paper and could do so because the paper was not an independent produc-

tion, but was a graded activity primarily paid for by the school board.

The pedagogical concerns arose from an article about three pregnant students at

the school and another article on the effects of divorce on students. The principal was concerned that the pregnancy story did not adequately protect the identities of the pregnant students and the divorce story neglected to give identified parents a chance to respond to their child's criticism of divorce.

The court held that where, as here, the newspaper represents not a forum of free speech, but a "supervised learning experience" for students, the school can control the contents of the publication.

However, if the paper were not a class activity, but an extracurricular with some faculty supervision, the courts will tolerate far less control over the content of the paper.

For instance, when a superintendent in Michigan ordered a student article pulled from the school newspaper because of inaccuracies in the article, the courts found in favor of the student.

The student had written about a lawsuit filed by neighbors of the district's bus garage who claimed the fumes from idling buses created a nuisance and harmed their health. The student contacted the district for comment, but the district refused to do so.

The court found that any inaccuracies in the article were immaterial and the superintendent had no valid reason for pulling the article other than her dislike of the viewpoints expressed in the article.

However, a school newspaper can be censored based on reasonable belief that the content is defamatory (Draudt v. Wooster City School District, Ohio D.Ct. 2003) or causes disruption in the school. The disruption, or potential disruption, must be a real threat, not just discomfort or negative reactions to student comments (Smith v. Novato Unified School District, Cal. App. 2007, district violated student First Amendment rights by requiring student to retract editorial on immigration).

Utah State Office of Education

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UPPAC CASES

- The Utah State Board of Education suspended the educator license of Linda D. Jackson for 6 months. The action results from Jackson's failure to comply with the terms of a prior Letter of Reprimand.
- The State Board suspended Kenneth J.
 Thompson's license for 2 years. The suspension results from Thompson's accessing and exposing students to sexually inappropriate and pornographic materials on his school computer. Thompson also attempted to coerce students not to testify against him.
- The State Board revoked the license of Christopher A. Burton following his criminal conviction for eight second degree felony counts of sexual abuse of a child.

Eye On Legislation

As the legislative season arrives, we thought this would be a good time to discuss the process and sources of information about legislation.

Bills and bill requests from legislators can be viewed from the USOE website. By clicking on www.schools.utah.gov/law/leg2008/usoeleg2008.htm, an educator can decided whether to view bills/requests by subject, check out what his/her own legislator is proposing, or look for bills that have been numbered. A bill is a request until it is drafted in a form acceptable to the sponsoring legislator and given a number.

Once bills are numbered, the fiscal analyst's office sends the bills to various agencies for fiscal note input. Education bills are sent to the USOE and, depending on the topic, districts.

USOE's financial wizards receive the request for fiscal input and provide information on estimated costs based on their analysis and the analysis of others in the office who have expertise in the particular area(s) the bill addresses.

This process ensures that at least some of the potential ramifications of a bill are ferreted out before it is debated by legislators.

For example, a bill may require that school nurses train other school personnel in certain medical procedures but not have an appropriation associated with it. USOE might note that an appropriation of a certain amount is necessary to cover the costs of hiring a nurse to do the training in schools that do not currently have a nurse.

Currently, USOE is in the process of drafting fiscal notes for several bills. This process will continue throughout the session as bills are numbered or amended and require more fiscal analysis. USOE fiscal notes can be viewed at the site noted above.

In the early weeks of the session, most bills will be assigned to legislative committees in the chamber of the sponsor—House or Senate—for a public hearing. Committees must post their agendas at least 24 hours before discussing a bill. Education committee agendas can be viewed at the USOE site listed earlier.

Most, but not all, committees will allow public comment on the bills being considered. All legislators also provide at least one phone number, email address and business or home address where constituents can communicate with them. Contact information is available through the links at www.le.utah.gov/Documents/find.htm.

Once a bill passes a committee hearing, it is sent to the Rules Committee which will decide when, and if, the bill should reach floor debate. If it passes the first chamber, the bill is sent to the other chamber to begin the committee process again.

In the last weeks of the session, there are no committee hearings.

UPPAC Case of the Month

After many months of hard work, the State Board is set to approve a final rule establishing ethical standards for educators.

Throughout the process, the rule has received praise and criticism. Many are glad to see clear standards of professionalism, others can't understand why such standards are necessary. A few question specific standards, especially those related to off-campus behavior.

The Board is determined to set the standards, as it should be. The rule clarifies the expectations the State Board has of those it licenses, and the potential consequences if the expectations are not met.

The consequences range from a letter of admonishment, encouraging the educator to avoid certain conduct, to revocation of the educator's license.

Not every standard in the rule represents a revocable offense. And all of the standards should be easy for the majority of educators to live up to.

For instance, one standard requires that educators not distort curriculum materials. This doesn't mean that an educator who has a

bad lesson day and confuses students will face potential licensing review. But it does mean that an educator who uses class time to push a personal religious or political agenda

(such as giving an anti-abortion speech in a math class and calling it a statistics lesson) could be subject to license review.

Another standard requires that educators avoid arrests for things such as lewdness. Few educators would solicit sex from an undercover officer at a public restroom, but those who do need to understand that their actions reflect poorly on their ability to teach students to be law-abiding citizens. We may allow basketball stars to be poor role models, but few basketball stars spend 2 or more hours a day, 180 days a year, with minors who have no

choice but to be at school.

Thus, the rule sets the standards for the education profession. Given the amount of influence educators have over their captive student audience,

those standards are necessarily high.

However, given the quality of educators in the state, the vast majority will never fall short of the State Board's expectations.

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Recent Education Cases

Haas v. West Shore School Dist. (Pa. 2007): A Pennsylvania court found that a student could be expelled for violating the school's alcohol policy after doubting another student's claim that a bottle contained alcohol.

Haas was disciplined after he drank alcohol from an ice tea bottle. The student owner of the bottle told the Haas it contained alcohol. Haas didn't believe his fellow student and took a drink, only to discover that the owner was telling the truth.

Both students were suspended for 30 days for drinking alcohol on school premises. Haas' father argued that Haas couldn't be suspended because there was insufficient evidence that the bottle actually

contained alcohol (apparently, the students finished off the contents). The court noted that the student who owned the bottle tested positive for alcohol in a breath test taken the day of the incident and Haas admitted that the bottle did contain alcohol.

The father also tried to use a Pennsylvania law, based on federal law and similar to a Utah law, that requires prior written parental consent before a student can take a survey or evaluation that might reveal a student's criminal behavior.

The court quickly determined that the law did not apply to breathalyzers or other internal school disciplinary investigation techniques.

Ponce v. Socorro Independent School District (5th Cir. 2007): The Fifth Circuit ruled against parents seeking to keep a student's disturbing writings private.

The student kept a notebook diary which included extensive discussions of a fictional pseudo-Nazi club the author created and all of its destructive acts on the school campus, including a detailed plan for a shooting attack at the high school or a coordinated

shooting at all of the local schools at the same time. The student also detailed the club's plans to murder "two homosexuals and seven colored" people and a specific plan for setting another student's house on fire and brutally murdering his dog.

The student showed the diary to a friend, who reported it to an assistant principal. The assistant principal suspended the student and

gave the notebook to the police. The school district determined that the student should be placed in the district's alternative high school program.

The parents sued, claiming the book was a work of fiction and the school's actions violated the student's First Amendment rights. The parents sought an injunction preventing the school and district from placing the student in the alternative program, talking to any third parties about the notebook without the parents' consent, and from retaining any references to the incident in the student's school record.

The court denied the injunction request, finding that writings which pose a specific threat to a school are not protected by the First Amendment.

The court noted that not all threatening speech by students can be curtailed without First Amendment consideration, but a specific threat to the entire school population is certainly one instance where the school's compelling interest in student safety will outweigh any potential Constitutional rights of the student to have his say.

Your Questions

Q: We have had numerous questions lately about the legality of students or adult aides grading papers and entering scores. Where does the law now stand on this?

A: Many educators have at least a vague recollection of the 10th Circuit Court of Appeals case that ruled that students could not grade each other. For a while, schools within the 10th Circuit's boundaries were prohibited from posting student work that showed

What do you do when. . . ?

a student's name and teachers had to do all grading.

But that case is no longer the law of the land. The U.S. Supreme Court overruled the 10th Circuit in 2002.

The Supreme Court ruled that grades on student papers are not covered by FERPA. What IS cov-

ered is the final grade in the teacher's grade book, or computer file.

For those records that the school maintains, such as a final grade book or file, FERPA allows a teacher to share the information with other "school officials" who have a "legitimate educational interest" in the student information.

This means that student aides or adult volunteers, who are not "school officials" may grade student papers, but the teacher should be the only one who has

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The Utah Professional Practices Advisory Commission, as an advisory commission to the Utah State Board of Education, sets standards of professional performance, competence and ethical conduct for persons holding licenses issued by the Board.

The Government and Legislative Relations Section at the Utah State Office of provides information, direction and support to school districts, other state agencies, teachers and the general public on current legal issues, public education law, educator discipline, professional standards, and legislation.

Our website also provides information such as Board and UPPAC rules, model forms, reporting forms for alleged educator misconduct, curriculum guides, licensing information, NCLB information, statistical information about Utah schools and districts and links to each department at the state office.

Your Questions Cont.

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access to the grade book.

On the other hand, a paid adult classroom aide is considered a school official and may also access the grade book or computer file to input information.

Anyone with access to student records should be reminded of the importance of confidentiality. The person may also be asked to sign a statement to the effect that the person understands the need for confidentiality and will not release information except as required by other school officials with legitimate educational interests in the information.

Q: My child turned 5 in December. The state law says the child must be 5 by Sept. 1 of the year the student seeks admission. Can we enroll our child in kin-

dergarten in January of 2008 to finish the current school year?

A: No. Because a child is not entitled to education services from a school district until first grade, there is no right for a resident to be enrolled in kindergarten midstream, even if she or he has turned five.

Q: My school district provides pre-school but charges tuition for this service. Can the district charge tuition for preschool?

A: The school or district cannot charge tuition for pre-school. It can, however, have a for-profit day care on site, per state law. The key here is that the district or school would **contract with an out-**

side provider for the day care and could charge rent to the provider, without incurring all of the liability that comes with operating a day care—10 two year olds in an enclosed space is a highly volatile combination.

The day care could even provide some pre-school services, and charge its patrons for those services.

> But the district/ school cannot run the day care or preschool through its K-12 program and charge parents for the services.

Once a school or district decides to provide educational services

for the four-year old set, the same rules apply as for the five to eighteen year old group. The education must be provided free of charge to residents.